Francisco that houses his family's digital pictures to display them on his customized photo channel; obtain Internet content (e.g., stock quotes, local weather, etc.) from a SBC Yahoo! Internet server in Los Angeles to be viewed on the TV screen; and communicate with control equipment in Topeka to update parental controls.

The *NCTA Memo* suggests nothing to alter this analysis. *First*, the *NCTA Memo* is built upon supposition, not a true understanding of SBC's service. Regarding the most fundamental component of IP-enabled video – its two-way nature – NCTA's equivocation is telling: "Since IPCable content is "video programming," it is also likely to be classified as a 'cable service' *in so far as 'one-way transmission to subscribers' characterizes the service.*"[49] The import of this furtive hedge is that, in so far as the one-way transmission to subscribers *does not* characterize the service, it is *not* classified as a cable service.

But, it is precisely the two-way interactive aspect of the service that, from a Title VI classification perspective, distinguishes IP-enabled video from cable service.[50] And, it is what will allow SBC to provide unique features to its voice, video, and data services.[51] For example, SBC's network and service will be capable of allowing subscribers to tailor and manipulate much of the content they view. Eventually, this interactive two-way capability will allow SBC

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[49] *NCTA Memo* at 23 (emphasis added).

[50] *See, e.g.*, Peter Grant, *Air Battle: SBC vs. Verizon: The War of the TV Wannabees*, The Wall Street Journal, July 18, 2005 at R8 (". . . SBC is relying on the Internet technology with which viewers will request one channel at a time from servers, the same way Internet users access Web pages on their computers.")

[51] *Id.* ("Because of the technology it is using, SBC also will be able to much more easily integrate Internet and other TV services so customers will be able to, say, program their digital video recorders remotely over the Internet.")

to offer a service that will enable subscribers to (1) select different camera angles or audio feeds; (2) request additional content of particular interest to them, including "converged" Internet-sourced content that the customer can view and interact with on a real time basis while watching video programming content, such as obtaining sports score updates on screen from a secure network location with Internet-sourced data while a game is in progress; (3) use enhanced "picture-in-picture" and "mosaic" features for simultaneous viewing of multiple video streams; and (4) interact with "triggers" in video streams that would allow customers to vote in news polls and have collated voting data appear on screen in real time.[52] This new dimension of subscriber interaction—all of which is made possible by the fact that services are provided in the common IP format—goes well beyond that "required for the selection or use of . . . video programming or other programming service."[53] In addition, because voice, video and data will be offered over a converged IP-enabled network, each of those services ultimately will work together so that, for instance, an IP-enabled wireless phone could be used to remotely program a Digital Video Recorder ("DVR") or alter parental controls.[54]

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[52] SBC takes seriously the rights and interests of content owners. All programming arrangements and service components will, therefore, be a function of arrangements with content owners and applicable copyright protections.

[53] 47 U.S.C. § 522(6).

[54] NCTA's suggestion that SBC has argued in the past that the use of an IP backbone does not alter the nature of circuit-switched voice service is misleading at best (*NCTA Memo* at 5). SBC's IP-enabled video service does much more than employ IP transport; it utilizes IP technology end-to-end – including all the way to the subscriber – to enable a host of features that are not available over today's existing networks. Likewise, NCTA's reference to Ameritech's and SNET's obtaining of franchises in connection with their prior video deployments is wholly inapposite (*NCTA Memo* at 7). Those were deployments of traditional, one-way cable systems, not sophisticated IP-enabled broadband services and networks.

Second, the incumbent cable operators confuse the issue by claiming that they currently are providing on-demand services,[55] currently "employ" some IP technology in their systems,"[56] are "testing switched digital technology,"[57] and are "exploring the use of switched video."[58] Putting aside that much of what the cable incumbents say that they are going to do seems like ephemera,[59] NCTA's position is founded on a faulty premise, namely that cable incumbents will forever be subject to franchise regulation under Title VI regardless of the services they offer. This is not true. If the incumbent cable operators were to provide similar two-way interactive video services over a switched, IP-based architecture, then they too might have a viable claim that their services are not "cable services" subject to the franchising requirements of Title VI.

In the end, the paradigm that the cable incumbents propose would extend franchise regulation to virtually any provider of video services and thereby have far-reaching and negative consequences for the development of and continued innovation in advanced video services. According to the NCTA, any video service delivered over broadband, whether offered by a

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55 *NCTA Memo* at 1.

56 *Id.*

57 *Id.*

58 *Id.*

59 For instance, NCTA makes much of the increasing use of IP transmission in the cable platform. *NCTA Memo* at 14 n. 47. IP transport, alone, does not enable interactive, integrated features at the user level. Likewise, Time Warner Cable's "IPTV" trial in San Diego is not similar to the type of IP-enabled video service that SBC will deploy. Letter from Susan Mort, Counsel, Time Warner, to Marlene Dortch, Office of the Secretary, FCC, WC Docket No. 04-36 at 1 (July 7, 2005). That trial simply permits viewers to receive on their computer a "video simulcast" that is exactly the same programming they already receive over their television screen. Indeed, Time Warner executives view the PC as "just another outlet for video programming in the home." Ken Kerschbaumer, "TV on the PC Gets Real," *Broadcasting and Cable* (August 8, 2005), at 21.

facilities-based provider or a provider simply making use of another's facilities, would be just like cable programming, making the provider subject to the same franchise obligations as an incumbent cable operator.[60] Likewise, not only basic services, but also all forms of on-demand services would also be subject to cable franchise regulation.[61] Thus, the incumbents have set their sights on not just the telcos, but also the various independent providers, such as Internet video providers Akimbo, Netflix, MovieLink, and CinemaNow, not to mention a growing worldwide population of individuals offering Internet-based video services that grow technically more sophisticated and bandwidth-intensive all the time and, thus, increasingly rely on deployment of more advanced broadband networks.[62] In the world advocated by the cable incumbents, then, an Internet-based ("over the top" in NCTA parlance) video provider in Stockholm will have to obtain city-by-city franchise agreements before offering such a Web-

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60 *NCTA Memo* at 8.

61 *Id.*

62 *See, e.g.*, Peter Grant, *Cable Operators Rush Services To Keep Edge*, WALL ST. J., July 21, 2005, at B1(describing offerings by start-ups like Akimbo, DaveTV, and Brightcove Networks); Kevin Maney, *Netflix Plans Blockbuster Future of Serving Movie Watchers*, USA TODAY, June 15, 2004; Scott Moritz, *Netflix, TiVo Plan Leaves Viewers Hanging*, THE STREET.COM, Oct. 1, 2004; AP Online, *TV May Soon Beam from Cell Phone Screens*, COMMUNICATIONS MOSAIC, Jan. 7, 2005 (noting that SmartVideo Technologies Inc. recently announced deals to deliver television programs from ABC News, CNBC, MSNBC, and The Weather Channel to cell phones equipped with Microsoft Corp.'s Windows Mobile operating system); Kathryn Balint, *For television via Internet, future is now*, SAN DIEGO UNION-TRIBUNE, July 13, 2005, at C1 (describing Time Warner Cable's service allowing customers to watch television over their computers' high-speed Internet connection as a "nationwide first for a cable company"); *see also* Jefferson Graham, *Websites Act More Like TV To Keep Users "Tuned In,"* USA TODAY, June 16, 2005, at 1B, *available at* 2005 WLNR 9530948; Nick Wingfield & Ethan Smith, *Apple Looks to Sell Videos — and Maybe iPods to Play Them*, WALL ST. J., July 18, 2005, at B1 (discussing Apple's possible plans to offer video service over iPods).

based service. Such cannot be the regulatory framework envisioned by Congress – and it certainly is not one that the Commission should validate.[63]

B. SBC's Service Is Not Delivered over a "Cable System."

SBC's planned IP-enabled video service also takes SBC outside the definition of "cable operator" for the independent reason that the service will not be provided over a "cable system," as defined by the Act.[64] First, a "cable system" is defined by the Act as a "facility . . . that is designed to provide cable service."[65] As discussed above, Project Lightspeed is designed to provide a very different service than incumbent "cable service." By definition, then, this network cannot be a "cable system."

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[63] NCTA seems to justify its startling policy overreach on the grounds of achieving "regulatory parity." *NCTA Memo* at 1-3. This is a red herring. The cable incumbents embrace their articulated brand of parity – new entrants treated just like the incumbents – only when it serves their specific competitive position in the market. They have argued passionately that Voice-over-IP new entrants – cable included – should face no legacy telephony regulation, even though, as the Commission itself has recognized, VoIP does in some ways resemble circuit-switched telephony. And this is the correct position, and one that SBC and other telcos support. But, now that VoIP has been freed from state entry regulation and their sinecure in the video market is threatened by determined new entrants, the cable incumbents have changed their tune, and argue that some unbounded notion of parity mandates that all new entrants into the video market should face the same legacy entry regulation that the cable companies did when they entered the market as monopoly providers. The Commission should, however, reject this posturing for what it is: The "rank, crass hypocrisy" of a legacy provider about to be jarred by the rumble of competition. Steve Forbes, *Fact and Comment*, Forbes.com (09.19.05), *available at* http://www.forbes.com/forbes/2005/0919/031.html).

[64] 47 U.S.C. §§ 522(5)-(6); 541(b)(1). With respect to the distribution of broadcast signals, SBC's actual service offering will be in compliance with applicable carriage and retransmission arrangements with broadcasters.

[65] *Id.* § 522(7).

In addition, the Act specifically provides that a telephone company's facilities would not qualify as a cable system when used solely for "interactive on-demand services."[66] The Act defines an interactive on-demand service as "a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider."[67] This definition "has virtually no legislative history explaining its intent or meaning."[68]

As explained above, Project Lightspeed is a switched, point-to-point network that will allow each subscriber to interact directly with the network and select specific programming, which the network then transmits to that particular subscriber. This is in contrast to the much less efficient point-to-multipoint broadcast-like transmissions employed by incumbent cable operators, which simultaneously send all their channels to all subscribers' homes at once, and rely on set top equipment to allow each household to view those channels it has selected.[69]

In the end, SBC's purpose in deploying this point-to-point, two-way network is to provide subscribers with maximum flexibility in customizing what they see and when they see it. This type of IP-enabled network will be unique in its ability, ultimately, to untether subscribers from the confines of a programmer's pre-set schedule. And, while the ultimate breadth and scope of such on-demand capabilities will be a function of a number of factors, including

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66 *Id.*

67 *Id.* § 522(12).

68 *NCTA Memo* at 30.

69 The cable industry does not appear to disagree that Project Lightspeed satisfies this aspect of the definition of an interactive on-demand service. *See NCTA Memo* at 30-31.

arrangements with content owners and other programming vendors, the key is that SBC's Project Lightspeed entails an infrastructure that will include the capabilities to satisfy the interactive on-demand exclusion found in the Cable Act.[70]

C. A Conclusion that IP-Enabled Video Services Are Not Cable Services Under Title VI Is Entirely Consistent with the Overriding Purposes of the Act.

The Telecommunications Act of 1996 was intended to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[71] The Act's competitive goals apply to all markets, including specifically "[telephone company] entry" into video markets, by providing "multiple entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice of services."[72] And, as Congress made clear in section 706, the policy of this nation is to *encourage* the deployment of advanced infrastructure and capabilities, including video services.

The Commission has repeatedly found that section 706 supports deregulatory policies that encourage deployment of the new, broadband fiber loops that will be the critical underpinning for most telecommunications carrier provision of both video programming and the

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[70] To be clear, the programming that a distributor offers, and the manner in which it can be viewed, is not just a function of technology; it is also a function of the rights of and business relationships with broadcasters and other programming vendors. Like any other distributor, SBC will be bounded by these rights and relationships, as well as copyright rules. Nonetheless, the architecture that SBC is deploying is designed to offer consumers—as well as the programmers and content owners—maximum flexibility.

[71] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (preamble).

[72] H.R. CONF. REP. NO. 104-458, at 172, 177 (1996).

next generation of advanced telecommunications capabilities.[73] As the Commission has recognized, the application of burdensome obligations "to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure . . . in direct opposition to the express statutory goals authorized in section 706."[74]

The *Vonage Order* and *Cable Modem Order*, again, are concrete examples of the Commission effectuating these broad Congressional mandates. The *Vonage Order* clarified that new entrants into the IP-enabled services market are exempt from legacy "entry and certification requirements."[75] Similarly, the Commission clarified in the *Cable Modem Order* existing law does not impose on cable incumbents' cable modem services the *Computer II* access requirements imposed on ILECs when they provide competing DSL services. It found that imposing such legacy requirements might cause cable operators to "withdraw from the telephony market" and thus "undermine the long-delayed hope of creating facilities based competition in

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[73] *See, e.g.*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order on Remand and Further Notice of Proposed Rulemaking*,18 FCC Rcd. 16978, 17145 ¶ 278 (2003)("Triennial Review Order")(finding that new fiber broadband facilities are not covered by section 251(c) of the Act); Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), *Memorandum Opinion and Order*, 19 FCC Rcd 21496, 21512 ¶ 34 (2004) ("*Broadband Forbearance Order*"); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Order on Reconsideration*, 19 FCC Rcd 20293, 20297 ¶ 9 (2004) ("*BellSouth Order*").

[74] *Triennial Review Order* at 17149 ¶ 288; *see also id.* at 17145 ¶ 278 (noting importance of promoting fiber to the home because these enhance carriers' broadband capabilities).

[75] *Vonage Order* at 22416-17 ¶ 20.

the telephony marketplace and thereby seriously undermine the goal of the 1996 Act to open all telecommunications markets to competition."[76]

That same thoughtful approach must be applied to telco development of new broadband networks and entry into the video market. SBC's Project Lightspeed initiative, for one, is exactly the kind of broadband deployment that the Act was written to foster. This $5 billion capital project will enhance the broadband capabilities of SBC's existing communications network. The result, after the initial deployment phase that will include the addition of approximately 40,000 miles of fiber to SBC's networks, will be an advanced, IP-enabled broadband network available to approximately 18 million households in SBC's traditional 13-state service territory.

But entering the video services market to take head-on an entrenched, incumbent provider is a risky and costly enterprise – even under the best of circumstances. Deploying new region-wide video networks, and acquiring the kind of programming packages and video libraries that are attractive enough to win subscribers away from established cable operators, both require enormous investment. SBC is making its substantial investment without the assurance of a single customer.[77] Just the uncertainty of disparate, costly franchise litigation

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[76] *Cable Modem Order* at 4826 ¶ 47. Cable incumbents also are exempt from any obligation to contribute to universal service when they provide cable modem services, while incumbent LECs do contribute on their DSL service — yet another disparity in the level playing field touted by the incumbent cable operators as the holy grail of fair competition. *See, e.g.*, Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3054 ¶¶ 79-80 (2002).

[77] *See* Press Release, SBC Communications Inc., *SBC Communications To Rapidly Accelerate Fiber Network Deployment In Wake of Positive FCC Broadband Rulings* (Oct. 14, 2004), *at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21427.

or onerous franchise requirements could delay, if not derail, deployment.[78] And the actual dollar costs of delay and onerous incumbent franchise requirements could simply overburden the already slim calculus underlying not only the offering of video services over advanced telecommunications carrier networks, but any deployment at all of such networks.[79]

The losers in that event, as Representative Boucher has noted, would be consumers, who would be deprived of a source of video competition that could help increase programming diversity and choice and create sorely needed cable pricing pressure.[80] More broadly, consumers would be at risk of losing a robust, innovative source of new advanced services, because without the ability to earn video revenues in the near future, telecommunications carriers are unlikely to be able to justify rolling out their new fiber networks at all; analysts generally agree that the ability to offer video is the critical component justifying the high cost of the fiber build-out.[81]

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[78] As the Commission has long recognized, "regulatory uncertainty . . . in itself may discourage investment and innovation." *Cable Modem Order* at 4802 ¶ 5; *see also* Notice of Proposed Rulemaking, *1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*, 17 FCC Rcd 3019, 3022-23 ¶ 5 (2002); Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1421 ¶ 25 (1994).

[79] To the extent municipalities themselves plan to enter the video market through public financing without the need for franchise agreements, the incentives for competitive entry would be even more diminished. *See, e.g.*, Carol Wilson, *Lafayette voters overwhelmingly OK fiber network*, TELEPHONY ONLINE, July 18, 2005 (recent vote in Lafayette, Louisiana approved construction of a city-owned fiber-to-the-home network to provide voice, data, and video); *Today's News*, COMMUNICATIONS DAILY, July 26, 2005 (Utah's UTOPIA consortium of 14 such municipalities building fiber broadband networks).

[80] Rep. Rick Boucher, *What Can Congress Do to Strengthen Telecommunications Laws?*, ROLL CALL, June 6, 2005.

[81] *See, e.g.*, A. Kilshore, Yankee Group, *Will Video Drive New Revenue Growth for Telcos?*, May 2004, at 11 (telephone companies "must commit to a video strategy today for it to drive revenue in the future"); *SBC, Verizon Challenge Cable at Supercomm*, TELECOM A.M., June 7, 2005 (noting Verizon

III. THE ACT SHOULD NOT BE READ TO IMPOSE REGULATORY REQUIREMENTS WHEN DOING SO WOULD NOT SERVE THE PURPOSE BEHIND THOSE REQUIREMENTS.

The Act's provisions should also be construed so as to avoid the imposition of regulatory requirements that have no relation to the purpose for which they were established. As noted above, among the most burdensome consequences of being characterized as a "cable operator" are the requirements of negotiating and obtaining thousands of franchises before a new telco entrant can enter the market competitively. Franchise regulation, however, has always been rooted in municipal governments' need to regulate and manage the use of public rights of way. Title VI itself thus expressly limits the obligation to obtain franchises to those facilities that use a "public right-of-way."[82] And the Act's legislative history confirms that "[t]he premise for the exercise of . . . local jurisdiction over cable systems continues to be [the] use of local streets and

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comment that the "ability to offer video is a central premise of Verizon's broadband rollout"); Cynthia Webb, *SBC Bets $6 Billion Against Cable*, WASH. POST, June 23, 2004, *available at* 2004 WLNR 5856851 ("The launch of new services like video is vital for SBC and the other regional Bell companies, analysts said."); Buckingham Research Group, *Network Wars: Exploring Fiber's Rewards, Risks, Myths & Competitive Implications*, Nov. 30, 2004, at 23 ("In SBC's case, gaining a strong foothold in the video market will be absolutely critical to making the project [Net Present Value]-positive[.]").

[82] 47 U.S.C. § 522(7)(B). The Cable Act does preserve a very limited form of state or local authority to "license or otherwise regulate" facilities which serve only multiple unit dwellings under common ownership, control, or management, even without use of public rights of way. *Id.* § 541(e). However, even this limited preservation of authority for this discrete set of facilities did not extend to the preservation of *franchising* authority. Quite the contrary. It was intended not to disturb "the F.C.C.'s [prior] franchising preemption" for such facilities. *Guidry Cablevision v. City of Ballwin*, 117 F.3d 383, 385 (8th Cir 1997) (citing House report endorsing FCC's prior ruling). That FCC decision had preempted "state or local government *entry* regulation of SMATV," while preserving local "zoning or public safety and health" or other similar authority. Earth Satellite Communications, Inc., *Memorandum Opinion, Declaratory Ruling, and Order*, 95 F.C.C. 2d 1223 ¶¶ 19, 21 (1983)(emphasis added).

rights of way."[83] Indeed, in federalizing the franchising requirement, Congress incorporated the Commission's own pre-Cable Act premise for municipal regulation: "that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights of way in the communities they serve."[84]

Both the Commission[85] and the courts[86] also have repeatedly reaffirmed that franchising authorities' jurisdiction is implicated only insofar as a service uses the public rights of way. In deciding that "video dialtone" services offered by telephone companies should not be subject to cable franchise regulations, for example, the Commission stated:

> In enacting Section 621 of the Cable Act, Congress was primarily concerned with the use of public streets and rights-of-way by cable television operations and the ability of state and local entities to regulate such use. In contrast to cable operators, local telephone companies already receive authorization to use the public rights-of-way pursuant to

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[83] S. Rep. No. 97-518, at 5 (1982).

[84] Report and Order, *Definition of a Cable Television System*, 5 FCC Rcd 7638, 7639 ¶ 10 (1990).

[85] *See, e.g.*, Motion for Declaratory Ruling, Entertainment Connections, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 14277, 14301, 14307-08 ¶¶ 52, 62 (1998) (cable franchise requirement "inextricably linked to the use of public rights-of-way"); *Cable Modem Order* at 4750 ¶ 104 (citing *TCI* Cablevision of Oakland County, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 21396, 21429 ¶ 78 (1997) ("We are concerned that State or local regulation beyond that necessary to manage rights-of-way could impede competition and impose unnecessary delays and costs.").

[86] *See National Cable Television Ass'n v. FCC*, 33 F.3d 66, 73 (D.C. Cir. 1994)(upholding FCC determination that the Cable Act did not subject video dialtone to duplicative franchise regulation); *City of Chicago* 199 F.3d at 433 (affirming FCC ruling that SMATV operator qualified for franchise exemption because it did not use a right of way); *Century Federal Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1477-78 (N.D. Cal. 1986) (*quoting Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1406 (9th Cir. 1985)) (invalidating municipalities' exclusive franchise for failure to demonstrate nexus with need for "minimizing disruption" and "maintaining public thoroughfares"); *City of New York v. Comtel, Inc.*, 57 Misc.2d 585 (N.Y. Sup. Ct. 1968) (satellite content provider distributing its signal through telephone lines does not use public rights of way and thus not subject to city's franchise requirement); *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652, 656-57 (N.D. Ohio 1968) (city had no authority to impose franchise where operator "is not stringing wires or digging ditches or erecting poles so that the general problems which these activities present to the local residents are not present").

> common carrier regulation. Consequently, there is no basis to infer that Congress intended that local telephone companies secure a cable television franchise to use the same rights of way they are already authorized to use.[87]

Similarly, in upholding the Commission's decision against a challenge by NCTA, the D.C. Circuit held that it is the "use of public rights of way" that "provide[s] a key justification for the cable franchise requirement."[88]

In the case of SBC's proposed IP-enabled video service, the rights of way premise for municipal franchise regulation is wholly inapplicable. As the New York Public Service Commission has recently acknowledged,[89] municipalities (and state governments) *already* closely oversee telecommunications carriers' use of local rights of way when they use those rights of way to offer telecommunications services and information services. Telecommunications carriers are subject to a host of permitting requirements and rules that dictate how, when, and where they can deploy facilities in the public rights of way and that are

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87 Telephone Company-Cable Television, Cross-Ownership Rules, Sections 63.54-63.58, *Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd 5069, 5072 ¶ 11 (1992); *see also id.* ¶ 15 (concluding that franchise requirements would improperly involve franchising authorities in the review of proposals to build common carrier facilities); *id.* ¶ 22 (franchise regulation redundant because common carrier regulations "incorporate the same concerns about public safety and convenience and use of public rights-of-way that provide a key justification for the cable franchise requirement"); *see also* Implementation of Section 302 of the Telecommunications Act of 1996, *Order on Remand*, 14 FCC Rcd 19700, 19705 ¶ 9 n.29 (1999) (questioning whether municipalities should be permitted to impose franchising obligations on an OVS provider that "already has a franchise as a telephone company").

88 *National Cable Television Ass'n*, 33 F.3d at 73 (*quoting* Memorandum Opinion and Order on Reconsideration, *Telephone Company-Cable Television, Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 5069, 5072, ¶ 22 (1992)); *see also City of Chicago v. FCC*, 199 F.3d at 433.

89 Joint Petition of the Town of Babylon, the Cable Telecommunications Ass'n of New York, Inc. and CSC Holdings, Inc. for a Declaratory Ruling Concerning Unfranchised Construction of Cable Systems in New York by Verizon Communications, Inc., *Declaratory Ruling on Verizon Communications, Inc.'s Build-out of Its Fiber to the Premises Network*, Cases 05-M-0250, 05-M-0247, at 20-21, 26-27 (N.Y. Pub. Serv. Comm'n June 15, 2005).

designed to protect public safety and welfare.[90] Telecommunications carriers already are subject to the equivalent of a "franchise" or other agreement to use the public rights of way.

SBC will continue to comply with these rights of way protections and rules in deploying new video facilities, and the fact that its facilities will carry some video services will in no way increase or even change the burden on the rights of way. As the Commission determined in the *Cable Modem Order*, "a local franchising authority [should not be free] to impose an additional franchise" on a provider that is already — and would continue to be — subject to one set of franchising obligations as a result of its use of those rights of way.[91] As the Commission explained, imposing a duplicative tier of franchising regulation would "extend[] far beyond local government interests in managing the public rights-of-way," and would likely "impede competition and impose unnecessary delays and costs on the development of new broadband services."[92]

Moreover, non-imposition of incumbent cable franchising requirements will not in any way usurp the current authority of municipalities to require permits each time telecommunications carriers seek to cut pavement or lay fiber or do any other construction; to

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[90] *See, e.g.*, ARK. CODE ANN. § 14-200-101(a)(1)(A) (2004); CITY OF UPPER ARLINGTON, OHIO STREETS AND SERVICES CODE, § 933.03(B) (2004); KAN. STAT. ANN. § 17-1902(d) (2004); OHIO REV. CODE ANN. § 4939.03(C)(1) (2004).

[91] *Cable Modem Order* at 4850 ¶ 102.

[92] *Id.* at 4850 ¶ 104. Indeed, avoidance of such duplicative and unnecessary regulation would avoid serious questions about whether constitutionally protected speech rights would be infringed by state regulation of public rights of way that has no real purpose in the circumstances. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 180 (2003); *see also, e.g., Clark v. Martinez*, 125 S. Ct. 716, 724 (2005) ("If one [statutory construction] would raise a multitude of constitutional problems, the other should prevail[.]"); *Pacheco v. Serendensky*, 393 F.3d 348, 355 (2d Cir. 2004) ("The canons of construction, however, require us to construe statutes in such a way as to avoid raising such constitutional concerns.").

require payment of applicable excavation and right of way management fees; and to ensure compliance with public safety and traffic requirements for rights of way projects. In short, the absence of a *cable franchise* will in no way detract from municipalities' ongoing rights to manage telecommunications carriers' use of the local rights of way. Imposing a cable franchise is clearly not necessary to protect those rights of way; to the contrary, it would be entirely duplicative.

In short, as the Commission has concluded, "administration of the public rights-of-way should not be used to undermine efforts of either cable or telecommunications providers to upgrade or build new facilities to provide a broad array of new communications services."[23] IP-enabled video service will not impose any incremental burden on public rights of way. Thus, interpreting the language of Title VI to require additional barriers to entry would not serve the underlying purpose of the franchise requirements of Title VI.

Such a statutory disconnection would also raise important First Amendment considerations.[24] The Supreme Court has established that "cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the

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[23] *Cable Modem Order* at 4850 ¶ 104 (quoting Memorandum Opinion and Order, *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21429 ¶ 78 (1997)); *cf. id.* at 4849-50 ¶ 102 ("Once a cable operator has obtained a franchise . . . our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service.").

[24] It is axiomatic that, when interpreting a statute, "a court must consider the necessary consequences of its choice. If one [construction] would raise a multitude of constitutional problems, the other should prevail . . . ." *Clark*, 125 S. Ct. at 724.

First Amendment."[95] The same is equally true of other would-be providers of video content to subscribers, as the federal courts uniformly concluded in a series of decisions striking down a (now-repealed) Cable Act ban on the provision of video programming by local telephone companies. Applying the Supreme Court's *Turner I* decision, these courts all concluded that such a ban implicated the First Amendment by "prohibiting [common carriers] from directly engaging in this form of speech within a certain area,"[96] and warranted intermediate scrutiny under *United States v. O'Brien*.[97]

The *O'Brien* standard permits the government to impose a restriction on speech only "if [the restriction] furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[98] In order to identify the governmental interest in burdening protected First Amendment activity, courts look closely at the underlying law and its purpose as identified in the

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[95] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

[96] *U S WEST, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated as moot*, 516 U.S. 1155 (1996) (statute violated First Amendment under intermediate scrutiny standard); *see also Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994) (same); *see also Southern New England Tel. Co. v. United States*, 886 F. Supp. 211 (D. Conn. 1995); *Southwestern Bell Corp. v. United States*, Civ. A. No. 3:94-CV-193-D, 1995 WL 444414, at *3 (N.D. Tex. Mar. 27, 1995); *NYNEX Corp. v. United States*, No. 93-323-C, 1994 WL 779761, at *2 (D. Me. Dec. 8, 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335, 1344 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721, 737 (N.D. Ill.1994).

[97] 391 U.S. 367 (1968).

[98] *O'Brien*, 391 U.S at 376-77; *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*").

legislative history.[99] Here, as discussed above, those sources make clear that franchise regulation has always been rooted in municipal governments' need to regulate and manage the use of public rights of way. Indeed, the Supreme Court has specifically held that the First Amendment analysis of the legality of local cable franchising requirements should turn on information about the relevance of the requirement to the would-be-provider's "use of the public utility poles and rights-of-way and how [it] proposes to install and maintain its facilities on them."[100]

No additional government regulatory interest — much less a substantial one — is triggered by the mere fact that some of the packets SBC will transmit over its networks (and the rights of way) will contain video. These networks *already* have the right to use local rights of way, and the transmission of these video packets will involve no additional burden on those rights of way. Interpreting the Act to impose such "duplicative"[101] rights of way authority would thus create significant First Amendment concerns under *O'Brien*.

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99 *See, e.g., Turner II*, 520 U.S. at 195-204 (looking to congressional findings concerning the statute in question to determine government interest); *Turner I*, 512 U.S. at 662-63 (examining the congressional history of the regulations in question); *U S WEST*, 48 F.3d at 1101 (turning to congressional findings).

100 *City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 495 (1986) (remanding challenge to exclusive franchising requirement); *City of Los Angeles v. Preferred Communications*, 13 F.3d 1327, 1330-31 (9th Cir. 1994) (on remand from the Supreme Court, rejecting city's claim of need for such requirement).

101 *National Cable Television Ass'n*, 33 F.3d at 73; *see also City of Chicago v. FCC*, 199 F.3d at 433.